of the proof which might have been expected from the Defendant, to show that he did obtain possession in some way under the original mortgagee, either by a sub-mortgage, or by some arrangement with the widow of Oomrao Singh.

That the claim to treat the Rajah as a mortgagee was not put forward for the first time after the settlement is clear from a petition, dated the 12th June 1856, of Mohun Singh. "After the usual petitionary address the "petitioner states that the estate of Rawapoor, "etc., the petitioner's ancestral landed pro- "perty, was mortgaged to Rajah Nawab Ali "Khan, and at the time the settlement was in "progress"—that is, the settlement before the mutiny—"the Court ordered the petitioner to "arrange for the payment of the redemption "money." That, of course, is no evidence that there was such a mortgage; but it is proof that the case upon which the Plaintiffs now rely was put forward at this early period. The petition, no doubt, does not state that the mortgage was to Oomrao Singh, and that by sub-mortgage the land got into the possession of Nawab Ali Khan; but it sufficiently shows that it was then contended that in some way the Rajah held as mortgagee.

In the present suit the evidence consisted of two depositions of witnesses given at the time of the settlement, and of the evidence of one of the Plaintiffs. The deposition of Amjud Ali, who was the vakeel of the Rajah Nawab Ali Khan at the settlement, has been mainly relied on by the Courts below. It seems that the Rajah was at that time a minor, and that his estate was under the care of the Commissioner. This deposition has the character of a statement of claim on the part of the minor Rajah; and treating it in that way it certainly affords evidence that at that time the claim of the

Rajah to a settlement was put on the ground that he was mortgagee. The statement in the deposition is this:—"The villages of "Koomhurya and Mahurya were mortgaged by "Hoolas and Moonno Sing to Oomrao Singh, "Talookdar of Rihar, whose widow, after his "death either in 1254 or 1255 Fuslee, re-mort-"gaged them, along with the talooka of Rawa-"poor, to my master. The deed of mortgage is "in my possession, and the amount is therein "mentioned. I do not remember the exact "amount; and ever since the re-mortgage we "have continued in possession." The Rajah was in possession. The vakeel had to account for his possession, and this is the statement which he gives, and upon which it appears that action was taken; for in 1264 Fuslee, according to this man's statement, the lease was executed in favour of the Rajah. There is a deposition of Duryao Singh, Canoongoe of Tehsil Biswan, to the same effect, but that cannot be regarded as legitimate evidence, because it is not shown that the man was dead, and he certainly did not stand in the relation of agent to the Rajah.

Then there is the positive evidence of one of the Plaintiffs who was examined in the present suit, Esree Singh, who is the grand-son of Mohun Singh. He says:—"In 1254 "Fuslee Mohun Singh mortgaged the estate "in question to Oomrao Singh for 3,067 "rupees. One year after the date of the mort-"gage he died. He was Talookdar of Rihar. "His widow mortgaged it to Rajah Nawab Ali "Khan for 5,200 rupees in 1256 Fuslee. Ever "since up to the annexation he held. No term "for redemption was fixed."

The original mortgage being beyond dispute, and there being this evidence that the Rajah held under a sub-mortgage, an answer was certainly called for on the part of the Rajah;

and the answer he gives appears to be entirely unsatisfactory. He does not rely upon mere possession and say, I got in as a trespasser, and am entitled to hold the talook by virtue of possession and protected by the Statute of Limitations; but he sets up an affirmative title that the chuckladar leased it to him, and he has entirely failed to prove that title. He has asserted, but has not proved it. Their Lordships think therefore that, under the circumstances, they cannot say that the two Commissioners, who found the facts, were wrong in coming to the conclusion that the Rajah did hold the talook, by some title derived from the original mortgagee; and, that being so, they think that the judgment of the Judicial Commissioner upon the main question should be supported. Mr. Capper, the Judicial Commissioner, who first heard the special appeal, differed from the Commissioners below, thinking the evidence was insufficient, but upon review Mr. Currie came to the opposite conclusion. Therefore three Commissioners in Oude have thought that this evidence was sufficient.

What has just been said disposes of the main question in the case.

Then another question arises, whether the decree of the Judicial Commissioner should stand with respect to the interest. It is immaterial to inquire whether the Judicial Commissioner had power to vary the decree of the officiating Commissioner in the way he has done, since their Lordships have the whole record before them upon general appeal, and may direct the right order, if this be not the right one. Upon the construction of the original mortgage to Oomrao Singh, which must govern this question, it appears to them that the usufruct was to be set against the interest, and that it was not the intention of the parties that the mortgagee should

have both the usufruct of the property and be paid interest at the stipulated rate of 43 per cent. from the time of the mortgage down to the period of redemption. It would require very clear words to induce their Lordships to put such a construction upon the deed. (See on this point a judgment of this tribunal, *Seth Seetaram and another against Argoon Singh*, delivered on the 19th February 1874.) If it had been shown that the usufruct would not have amounted to the stipulated interest, other questions would have arisen, and possibly an account might have been decreed; but Mr. Cowie, on the part of the Appellant, has exercised a wise discretion in desiring that the matter should remain, if their Lordships were of opinion that he was not entitled both to the interest and the usufruct, where the Judicial Commissioner has placed it, so far as this claim to interest is concerned.

In the result their Lordships will humbly advise Her Majesty to affirm the decree appealed from, and to dismiss this Appeal, with costs.